John Khetsuriani

THE GEORGIAN CONSTITUTIONAL COURT'S POWER IN THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS

John Khetsuriani
PhD in Law
Professor, Associated Member of
Georgian National Academy of Sciences.

Within the scope of a Constitutional Court's power, a modern state performs one of its most important functions – the protection of fundamental human rights. This function is a direct consequence of the state's constitutional obligation, according to which: "The state shall recognise and protect universally recognised human rights and freedoms as eternal and supreme human values. While exercising authority, the people and the state shall be bound by these rights and freedoms as directly acting law" (Article 7, Georgian Constitution).

This provision of the Constitution outlines the principles for the state's attitude towards the fundamental rights and freedoms of an individual as well as the key legal principles of a democratic state. In particular:

Human rights and freedoms are regarded as eternal, inalienable human values that are inherent and natural to people. Therefore, the state cannot deprive an individual of these rights, refuse to respect and protect them;

Every person is entitled to human rights and freedoms, irrespective of citizenship or the lack thereof. Therefore, human rights and freedoms are of universal nature;

As a directly acting law, human rights and freedoms do not need to be specified in national legal acts. In any case, they must be realised, ensured and protected by the state. A state and even the people, who are the carriers of sovereign rights and the source of government, are restricted by human rights and freedoms.

Given the significance of human rights and freedoms, the Constitution envisages the necessary legal guarantees for their protection. The most effective among them is the protection of human rights and freedoms by courts. Under Paragraph 1, Article 42 of the Constitution, "Everyone has the right to apply to a court for the protection of his/her rights and freedoms".

Court protection is a human right itself. At the same time, it is a necessary guarantee, the means for the protection of all of the other human rights and freedoms. The protection of human rights and freedoms by courts is, first and foremost, performed by general courts within the scope of their competence. The Constitutional Court, however, performs this function by examining the constitutionality of those normative acts that are adopted in relation to the fundamental human rights and freedoms recognised under Chapter II of the Constitution. The Georgian basic law defines the Constitutional Court's authority in the area of the protection of human rights and freedoms as follows – the Constitutional Court shall "consider, on the basis of a claim of a person, the constitutionality of normative acts in relation to the fundamental human rights and freedoms enshrined in Chapter Two of the Constitution" (Subparagraph F, Paragraph 1, Article 89).

It stems from this that a normative act can fall under the Constitutional Court's jurisdiction only if there is an organic link, and a direct relationship between this normative act and the fundamental human rights and freedoms recognised under Chapter II of the Constitution.

The existence of this relationship, of an organic link, is clearly seen in the subject of the normative act's regulation. The subject of the normative act's regulation (or of its part), falling under the jurisdiction of the Constitutional Court, shall be one of the fundamental human rights and freedoms guaranteed under Chapter II of the Constitution. For example, the Georgian Law on Assemblies and Manifestations, which regulates the relations concerning one of the rights recognised by Article 25 of the Constitution – the right to public assembly; or the norms of the Georgian Code of Criminal Procedure, which regulate the relations concerning one of the rights recognised by Article 42 of the Constitution – the right to fair trial, and so on and so forth.

The legal definition of the Constitutional Court's jurisdiction clearly outlines that a normative act to be considered by the court must be adopted not generally in relation to human rights, but in relation to "fundamental human rights and freedoms". At the same time, these "fundamental human rights and freedoms" must be recognised under Chapter II of the Constitution.

Such a definition of the Constitutional Court's power is, in our view, absolutely logical as a human right against which a normative act's constitutionality is to be examined, and shall be recognised and envisaged by the Constitution itself. Otherwise, it would be impossible to discuss a disputable normative act's constitutionality.

The discussion of this aspect of the Constitutional Court's adjudicative power could finish here, but several issues will arise in this respect that must be answered to ensure the proper perception of the limits of the Constitutional Court's powers in the area of human rights protection. First, it needs to be identified which human rights belong to the category of "fundamental human rights and freedoms". Since the legislator uses the term "fundamental", it is logical to assume that there are also "non-fundamental" rights. Besides, the difference between "rights" and "freedoms" should be specified and, what's more important, there is a need to explain Article 39 of the Constitution, which implies that Chapter II of the Constitution does not contain an exhaustive list of human rights. This, in turn, creates problems in court practice when taking a decision on the issues concerning human rights recognised by Chapter II of the Constitution.

As regards the interrelation between "rights" and "freedoms", it can be said that, in the end, they are identical terms from the standpoint of their legal nature and system of guarantees. Both define the boundaries of a person's social capacities in various spheres of social life, which are guaranteed by the state[1]. Some scholars, however, outline the difference between them and try to group rights and freedoms by certain characteristics. They think that most fundamental rights are so-called "rights of freedoms". They ensure a free area for the activity and behaviour of the people, which the state either does not intrude or intrudes upon specific grounds – only in cases explicitly prescribed by law and in accordance with a corresponding rule[2].

We do not regard this definition as good enough to draw a clear line between rights and freedoms since this definition can be equally applied to rights as well.

Of course, the freedoms are marked with some peculiarities as compared to the rights. The term "freedom" implies a vast opportunity for a person to make an individual choice, and does not specify the outcome of this choice. For example, we can quote constitutional definitions of freedoms: "Everyone has the right to freedom of speech, thought, conscience, religion and belief" (Paragraph 1, Article 19), or "The freedom of intellectual creation shall be guaranteed" (Paragraph 1, Article 23), etc. In contrast to the above, the term "right" defines a specific action of a person. For example, "Every Georgian citizen who has attained the age of 18 shall have the right to participate in a referendum or the elections of the state and self-government bodies" (Paragraph 1, Article 28), or "Everyone shall have the right to receive education and the right to free choice of a form of education" (Paragraph 1, Article 35), etc. We think that such peculiarities are not essential and, therefore, cannot be used as arguments to substantiate the difference between rights and freedoms as two different notions. They may just have educational meaning, but cannot determine any specifics of the Constitutional Court's adjudicative power de-

[1] Human Rights. Editor E.A. Lukashyeva. Norma publishing house, Moscow, 2002, p. 133.

[2] Konstantine Kublashvili. Fundamental Rights. Legal Manual. Tbilisi, 2003, pp. 41-42.

pending on whether a normative act's constitutionality is examined against the rights or freedoms.

As regards issues related to "fundamental rights" and Article 39 of the Constitution – as I have already noted above, the Constitutional Court considers the constitutionality of normative acts in relation to the fundamental rights and freedoms recognised under Chapter II of the Constitution. However, a question arises – which rights are fundamental human rights and does Chapter II recognise all of the fundamental human rights?

Chapter II of the Constitution – "Georgian Citizenship. Fundamental Human Rights and Freedoms" – defines civil (personal, political, social and economic and cultural) rights of a person, as well as special rights (guarantees) to ensure the protection of these rights and freedoms.

Bearing in mind the title of Chapter II of the Constitution, we should assume that the rights outlined in this chapter are the fundamental rights of a person. Legal literature even notes that "fundamental rights are only those rights which are guaranteed by the Constitution". Therefore, in Georgia, one cannot find, for example, a fundamental right of labour as the Constitution does not contain the corresponding wording (Paragraph 1, Article 30 of the Constitution only notes that "labour shall be free")[3]. At the same time, Article 39 of the Constitution explicitly states that the "Georgian Constitution shall not deny other universally recognised rights, freedoms and guarantees of an individual and a citizen, which are not referred to herein, but stem inherently from the principles of the Constitution".

Therefore, considering the above said, if a normative act violates any of the fundamental rights, which are not provided in Chapter II of the Constitution, but are otherwise recognised (by, for instance, an international act), the Constitutional Court may consider the disputed normative act's constitutionality only if it substantiates that the right in question "stems inherently from the principles of the Constitution" and belongs to the category of fundamental rights and freedoms. Otherwise, it will be a matter of an internal normative act's non-compliance with the requirements of an international legal act. Because this cannot be determined, a dispute on the issue cannot be resolved by the Constitutional Court, as it does not fall within the remit of the Constitutional Court's powers. Such a dispute can be resolved in general courts, and not in terms of a normative act's constitutionality, but rather its legality.

In order to determine whether this or that human right, which is not provided in the Constitution, belongs to the category of fundamental rights, the Constitutional Court shall prove that the right in question is an inalienable human right and is inherent to any person, that the state cannot deprive a person of this right or deny its recognition, and that it stems

[3] Konstantine Kublashvili, ibid, p.40

inherently from the principles of democracy, legal state, social state, division of powers and other principles enshrined in the Constitution[4].

Therefore, Article 39 of the Constitution shall not be interpreted as providing an opportunity for examining a normative act's constitutionality against any human right. It only provides for the opportunity to fill a gap that may appear in the regulation of fundamental human rights in the Constitution.

To properly define the essence of the Constitutional Court's adjudicative power and, accordingly, identify its boundaries, it is necessary to make clear which normative acts can be examined for their constitutionality within this power of the Constitutional Court. Since the legislator does not specify any type of normative acts, we should assume that it implies any effective legal act or sub-law which has been adopted in accordance with the procedure established by the law. This, of course, must not include the Constitution and Constitutional Law because when defining the Constitutional Court's adjudicative power, the legislator explicitly states that, in this case, an object of constitutional control cannot be the norms of this Chapter, but only the normative acts that are adopted in relation to issues provided in Chapter II of the Constitution. The same holds true for the Constitutional Law, which is an instrument to make amendments or addenda to Chapter II of the Constitution. It is true that this law is also a normative act concerning the issues in Chapter II, but it becomes an integral part of the Constitution and a constitutional norm itself after it has been adopted. As regards the norms in Chapter II of the Constitution, which define fundamental human rights and freedoms, they represent the criteria and system of measurement for examining the constitutionality of normative acts. Therefore, they cannot become an object of adjudication by the Constitutional Court.

Thus, any normative legal act save the Constitution and Constitutional Law may be an object of constitutional control within the scope of the Constitutional Court's adjudicative power.

However, this definition is not sufficient to define those normative acts that can be controlled by the Constitutional Court in the area of human rights. A normative act shall, at the same time, be adopted in accordance with the established rule and be in force. The Constitution, the Georgian Law on Normative Acts and other legal acts define the rules for drafting, adopting (issuing), publishing, operating, registering and systematizing separate types of normative acts. If a normative act has been adopted in violation of these established rules, then the Georgian Law on Normative Acts renders it invalid (Paragraph 9, Article 25). Moreover, a normative act adopted in violation of established procedures does not lose legal power itself. This issue is considered and decided on by the relevant competent bodies, including the Constitutional Court, within the scope of their respective powers. The Consti-

[4] See Levan Izoria, Konstantine Korkelia, Konstantine Kublashvili, Giorgi Khubua. Comments on the Georgian Constitution. Fundamental Human Rights and Freedoms. Meridiani publishing house, Tbilisi, 2005, pp. 334-336.

tutional Court decides on this issue by means of its independent powers – formal control. However, the Georgian Law on the Georgian Constitutional Court[5] makes the fulfilment of this function compulsory together with the fulfilment of other powers, including when reviewing the constitutionality of normative acts adopted in relation to the issues of Chapter II of the Constitution (i.e. human rights). According to this law, when considering the constitutionality of normative acts adopted in relation to human rights, the Constitutional Court shall not only examine their content's compliance with the Constitution, but also "ascertain whether the procedure established by the Constitution concerning the adoption/enactment of, signing, promulgating and enforcing of a legislative act and a parliamentary resolution is complied with" (Subparagraph B, Paragraph 2, Article 26).

Two aspects are noteworthy here. The first is that, in such cases, the object of the Constitutional Court's formal control may be not any normative act, but only Georgian legal acts and the resolutions of the Georgian parliament. The second is that an additional obligation to conduct a formal control within the scope of the adjudicative power lies with the court irrespective of a demand in a complaint. According to Paragraph 2, Article 26 of the Georgian Organic Law on the Georgian Constitutional Court, the conduct of formal control by the Constitutional Court is also obligatory during the implementation of such powers as abstract control, the resolution of disputes on competence between state bodies, the resolution of disputes regarding the constitutionality of referendums and elections, the examination of the constitutionality of international treaties and agreements, as well as norm-control in case of the appeal of general courts. These are those rare cases when the Constitutional Court conducts constitutional control at its own initiative.

We have noted above that within the scope of adjudicative power, the Constitutional Court is obliged to carry out formal control only in regards to Georgian legal acts and parliamentary resolutions. As for other normative acts, they can be examined only in terms of their conformity with the law, as the rules for their adoption/issuance, signing, publication and enactment are not established by the Constitution. Therefore, they fall under the authority of general courts and other state bodies.

If a normative act has been adopted in violation of the procedure established under the Constitution and, at the same time, it does not, by its content, conform with the fundamental human rights and freedoms recognised in Chapter II of the Constitution, the Constitutional Court declares this normative act (or its part) unconstitutional and, therefore, invalid on both grounds. Whereas, if a normative act does not conform with the fundamental human rights and freedoms recognised in Chapter II of the Constitution or has been adopted in violation of the procedure established under the Constitution, the Constitutional Court declares this normative act unconstitutional and, therefore, invalid on one of the above grounds.

[5] See the Georgian Constitution. The legislation on the Georgian Constitutional Court, Batumi, 2010, p. 67.

A normative act shall be effective to be considered by the Constitutional Court. The term "effective" in this case refers to the time of the act's operation, which is regulated in detail by Chapter IV of the Georgian Law on Normative Acts. This Chapter of the Law defines the terms and conditions for the enforcement and invalidation of normative acts. A normative act will be considered effective if it has entered into force in accordance with the established procedure and, at the same time, there are no conditions stipulated in the law that renders it invalid. It is only such a normative act that can be reviewed by the Constitutional Court. This requirement, which shall be met by a normative act to be heard in the Constitutional Court, is general and extends to any type of the Constitutional Court's power, which involves norm-control. However, when examining the constitutionality of normative acts adopted in relation to the fundamental human rights and freedoms recognised in Chapter II of the Constitution, the Constitutional Court also considers invalid, i.e. ineffective normative acts, in cases stipulated in the law. This sole exception from the general rule, which is stipulated in Article 13 of the Georgian Law on Constitutional Legal Proceedings (Paragraphs 2, 3^1 and 6), refers to those cases when a disputed normative act has been annulled or invalidated during proceedings in the Constitutional Court. According to this norm, the annulment or invalidation of a disputable normative act at the moment of hearing a case at the Constitutional Court results in the termination of the case. However, if a disputable normative act concerns the human rights and freedoms recognised under Chapter II of the Constitution, the annulment or invalidation of a disputable normative act will not automatically result in the unconditional termination of the case in the Constitutional Court. The Constitutional Court is entitled to carry on the consideration of the case and determine the issue of the conformity of the annulled or invalidated disputable normative act with the Constitution if the ruling is of the utmost importance for ensuring constitutional rights and freedoms (Paragraph 6, Article 13). This exception to the law is intended to allow the Constitutional Court to identify violations of human rights and to effectively reinstate the violated rights through other legal means. Until 12 February 2002, the legislation on the Constitutional Court lacked such a norm and the annulment or invalidation of a disputable normative act at the time of hearing a case necessarily entailed the unconditional termination of the case, without exception, in the Constitutional Court. Such a rule was a sort of incentive for a body having adopted a disputable act and there were frequent instances of annulling or amending disputable normative acts in the process of legal proceedings in the Constitutional Court, which led to the determination of the proceeding on the case. This practice not only undermined trust in the court, but also actually deprived complainants of the opportunity to recover their violated rights. Therefore, the legislator acted properly when it took into account the court practice's shortcoming and allowed the abovementioned exception from the general rule by amending the law[6]. After this legal innovation, Constitutional Court practice in the area of human rights protection significantly improved.

[6] Georgian legislative bulletin, 2002, №4, Article 7.

For illustration purposes, I will quote a case from the practice of the Constitutional Court – *Georgian Citizen Salome Tsereteli-Stevens vs Georgian Parliament (№2/2/425)*[7].

A Georgian citizen, Salome Tsereteli-Stevens, married US citizen Mathew Ryan Stevens on 9 September 2009. For the registration of the marriage, she was asked to submit together with a certificate on the absence of any circumstances hindering her marriage, as envisaged by Article 118 of the Georgian Civil Code, an approval from the Civil Registry Agency, which was compulsory to submit for citizens who wanted to marry a foreigner. This obligation was stipulated in Paragraph 5, Article 44 of the Georgian Law on the Registration of Civil Acts. Such an approval was obligatory to submit as a failure to do so would result in the refusal to register a marriage, according to Subparagraph B, Paragraph 1, Article 20 of the same law. Tsereteli-Stevens received an approval from the registry and paid a state duty of 120 lari. Only afterwards, she was able to register her marriage in a relevant service of the Public Registry. After the marriage, Tsereteli-Stevens filed a complaint with the Constitutional Court demanding the recognition of the unconstitutionality of the provision of Paragraph 5, Article 44 of the Georgian Law on the Registration of Civil Acts, which required a citizen to obtain approval from the registry to marry a foreigner. The complainant believed that the disputable norm violated her right to the freedom of marriage as guaranteed by Article 36 of the Constitution.

The Second Board of the Constitutional Court admitted this claim for consideration on merits on 25 October 2007. During the hearing on the claim's merits, parliament approved changes to the Georgian Law on the Registration of Civil Acts on 21 March 2008 and annulled the disputable norm. Nevertheless, the Constitutional Court did not terminate the case, continued its consideration and delivered a ruling, thus satisfying Tsereteli-Stevens' claim. In its ruling, the Constitutional Court emphasised that, in accordance with Paragraph 6, Article 13 of the Georgian Law on Constitutional Legal Proceedings, "After admitting a case by the Constitutional Court for the consideration of merits, the annulment or invalidation of an impugned act shall not result in the termination of constitutional legal proceedings before the Constitutional Court if the case concerns the human rights and freedoms recognised in Chapter Two of the Constitution". Therefore, the annulment of a disputable norm did not result in the termination of Case №425 in the Constitutional Court.

As regards the claim's merits, in its ruling, the Constitutional Court noted that Paragraph 1, Article 36 of the Constitution ensures the freedom of marriage to everyone, including a citizen of another state. It is unacceptable to force a person to marry and set up a family. It is also unacceptable to create any obstacle on the part of the state to those who want to get married by such means that are disproportionate and unacceptable for a democratic society. Since it is unclear from the disputable norm what the legitimate aim was that was necessary for society in pursuing the obligation to obtain the Civil Registry's approval to

[7] Georgian Constitutional Court. Resolutions, 2008, Batumi, 2009, pp. 22-33

register a marriage, the Constitutional Court resolved that the norm was inconsistent with the provisions of Paragraph 1, Article 36 of the Constitution and infringed on the complainant's freedom of marriage.

In regards to this topic, we deem it necessary to underscore some aspects which, in our view, are of principal importance:

First, the Constitutional Court is authorised to review an annulled or invalidated normative act only if the normative act concerns human rights and it has been annulled or declared void after the admission of the case for consideration on merits, i.e. after the announcement of a recording notice. At any other stage of the constitutional legal proceeding, for example, during a sitting on preliminary issues, the Constitutional Court does not enjoy such an authority and is obliged to terminate the case.

Second, the abovementioned rule is effective not only when the Constitutional Court considers, on the basis of a person's complaint, the case of the constitutionality of normative acts concerning the fundamental human rights and freedoms recognised under Chapter II of the Constitution (i.e. within the boundaries of the Constitutional Court's adjudicative power), but also during the implementation of any other power of the Constitutional Court that is associated with norm-control and, at the same time, when a disputable normative act is related to the fundamental human rights and freedoms recognised under Chapter II of the Constitution. Such a conclusion can be drawn from an analysis of the content of paragraphs 2, 3^1 and 6, Article 13 of the Georgian Law on Constitutional Legal Proceedings, which clearly show that an exception provided therein does not refer to one specific power of the Constitutional Court. Thus, the protection of human rights in the Constitutional Court is possible within the framework of other powers too. The abovementioned provision clearly indicates that human rights protection is a priority area for constitutional justice.

In describing the essence of the Constitutional Court's power in the protection of human rights, the Constitution (Subparagraph F, Paragraph 1, Article 89) says that the Constitutional Court exercises this power on the basis of the claim of a "person". Thus, the abovementioned normative acts or their separate provisions can be considered by the Constitutional Court within the boundaries of this power if corresponding subjects file a claim with it. The answer to the question as to who a claimant can be in such a case is given in Paragraph 1, Article 39 of the Georgian Organic Law on the Georgian Constitutional Court. This provision defines two circles of claimants, in particular:

a) Georgian citizens, other individuals residing in Georgia and Georgian legal entities, if they believe that their rights and freedoms recognised by Chapter Two of the Constitution are infringed or may be directly infringed upon by a normative act;

b) The Georgian Public Defender, if he/she believes that human rights and freedoms, recognised by Chapter Two of the Constitution, are infringed upon by a normative act.

As this provision shows, the first circle of subjects that may appeal to the Constitutional Court include individuals residing in Georgia and Georgian legal entities. They may challenge a normative act's constitutionality and appeal to the Constitutional Court on two occasions, in particular:

1) If a disputable normative act has already violated a concrete right of the claimant and the claimant directly suffered harm. In such a case – as it is rightly noted by the Constitutional Court in regard to one case – "a claimant shall provide evidence to the court, proving the fact of an intrusion of rights"[8]. The fact of "intrusion" implies that a claimant is the subject of the relations regulated by a normative act, that the implementation of this act directly affected him or her, extended to him or her, and resulted in the violation of his or her right. Therefore, the claimant is a victim due to the normative act's implementation. The European Convention on Human Rights and Fundamental Freedoms considers such a person a "victim".

In defining the circle of persons that can appeal to the European Court of Human Rights, Article 34 of the European Convention on Human Rights says: "The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto"[9].

An example of a victim is the claimant from the above-quoted case – *Georgian Citizen Salome Tsereteli-Stevens vs Georgian Parliament*. Tsereteli-Stevens was personally affected by the implementation of disputable norms as she married in accordance with the requirements of the norms that violated her right to marriage, as guaranteed by the Constitution, by means of the state's disproportionate interference, which is unacceptable for a democratic society.

2) A person can apply to the Constitutional Court for the protection of his or her rights not only when his or her rights have been violated and, hence, they represent "victims of the infringement of rights", but also in cases when there is a possibility of violating his or her rights and freedoms recognised under Chapter II of the Constitution. These are the cases when a disputable normative act (or a provision) has not affected a person yet, or he or she has not been affected by the implementation of the rules provided in the disputable norm, but there is a high risk that a person will become a direct subject of the violation of rights. Legal literature refers to such persons as "potential victims"[10].

[8] Georgian Citizens – Aleksandre Baramidze, Irakli Kandashvili and commandite society Andronikashvili, Saxen-Altenburgh, Baramidze and Partners vs Georgian Parliament, Decision №1/1/43 of the First Board of the Constitutional Court, Tbilisi, 1 March 2007.

[9] Convention on Human Rights and Fundamental Freedoms. Rome, 4 November 1950. Collection: A collection of main international legal acts in the area of the human rights protection. Public Defender's Library, Tbilisi, 2008, Part II, pp. 7-30.

[10] See Michele de Salvia. Precedents of the European Court on Human Rights. Guiding principles of a court practice concerning the European Convention on Human Rights and Fundamental Freedoms. Court Practice over the period from 1960 through 2002. Legal Centre Press publishing house, 2005, p. 806.

A "potential victim" shall be distinguished from those persons who try to implement the so-called "actio popularis", i.e., who make a normative act (or part of it) disputable only because it in abstracto violates the human rights guaranteed under the Constitution. Actio popularis is unacceptable under our legislation as well as the European Convention. A subject – a person, in this case, appealing to the Constitutional Court – shall be a victim or a potential victim of the violation of human rights. The question as to who can be considered a potential victim can be determined from the case law of the European Court of Human Rights and the court practice of the Constitutional Court.

According to the European Court of Human Rights, "a risk of future violation in exceptional circumstances can only become grounds for granting the status of a potential 'victim' to an individual provided that he or she submits reasonable and convincing opinions about the possible occurrence of a violation that will personally affect him or her"[11]. In this regard, the case law specifically notes that "the law can itself violate the rights of separate individuals if they are affected by its implementation even when there are no concrete measures of applying them"[12]. According to the case law, these are cases when a legislator establishes, for instance, confidential, hidden measures (phone tapping, drawing up secret dossiers). In such cases, it is not obligatory for a person to prove that such measures were used against him or her. Under case law, he or she will anyway be considered a victim of the violation of rights. The Constitutional Court applies the above-quoted precedents of the European Court of Human Rights in its court practice. A clear example of this is the case *Georgian Young Lawyers Association and Georgian Citizen Ekaterine Lomtatidze vs Georgian Parliament* (№1/3/407)[13].

In this case, the claimants demanded the invalidation of the provision of the Georgian Law on Operative Investigative Activity, which, in contrast to the requirements of Article 20 of the Constitution (the right to privacy), provided for the additional limitation of the secrecy of messages delivered by phone and other technical means.

Given the confidential and surreptitious nature of these measures (phone tapping, etc.) provided by law, the First Board of the Constitutional Court admitted this constitutional claim for the hearing on merits and satisfied the demand in a way that did not ask the claimants to submit concrete facts proving the state's intrusion in their right to the inviolability of messages delivered by phone or other technical means. In our view, the Constitutional Court absolutely rightly regarded the claimants as subjects eligible to appeal to the Constitutional Court, or to be more precise, as potential victims of the violation of rights, although the court did not duly emphasise this aspect. However, in the decision on another case, the Constitutional Court referred to this case an example and underscored that the claim concerning the case *Georgian Young Lawyers Association and Georgian Citizen Eka-*

[11] Ibid, p. 804.

[12] Ibid, p. 809.

[13] Decisions of the Georgian Constitutional Court, 2006-2007, Batumi, 2009, pp. 258-288.

terine Lomtatidze vs Georgian Parliament was admitted for hearing on merits because, given the content of a disputable norm, the claimants would find it impossible to provide concrete and convincing evidence of not only a potential violation of rights, but also of actually violated rights. At the same time, the probability was high for the claimant to become a participant in the relations envisaged by the disputable norm[14].

The ruling delivered on one case is noteworthy, inter alia, for one thing – in regard to one concrete case (which is interesting itself as it concerns the issue discussed in this paper), the Constitutional Court tried to formulate the standards for the definition of a "potential victim".

The essence of the case was the following – the constitutional complaint's authors demanded the invalidation of those norms of the Georgian Code of Civil Procedure and the Georgian Law on State Duties, which caused an increase in the state duties on applying to courts. The claimant believed that this was a violation of the right to apply to courts that was guaranteed by Article 42 of the Constitution. According to the claimants, the state duty itself was not a violation of rights, but the size of the state duty, including the maximum size, might restrict a person's ability to appeal to courts. In this regard, the Constitutional Court explained the provision of Subparagraph A, Paragraph 1, Article 39 of the Georgian Organic Law on the Georgian Constitutional Court, which allows persons to apply to the Constitutional Court if they believe that "their rights and freedoms recognised by Chapter Two of the Georgian Constitution may be directly infringed upon" by a disputable norm (the so-called "potential victim"). In such cases, according to the Constitutional Court:

a) The court shall study evidence, which proves that a claimant will necessarily become involved in the relations envisaged by the disputable norm in the foreseeable future. This, however, is possible only when there is a direct link between the disputable normative act and a claimant's rights;

b) In separate cases, the court may also evaluate the interrelation of a claimant and a disputable norm and the possibility of the restriction of the right, when it is objectively impossible to present concrete evidence, the possibility of the violation of rights is apparent from the content of the disputable norm and there is no doubt that a claimant can face the threat of the violation of the right".

In the ruling delivered on this case, the Constitutional Court noted that "neither in an application, nor in the sitting on preliminary issues, have the claimants substantiated that as a result of the implementation of the disputable norm they would face the possibility of the violation of rights. The claimants talk generally only about the right to apply to court, including an abstract possibility of the violation of their rights ... The claimants themselves

[14] Georgian Citizens – Aleksandre Baramidze, Irakli Kandashvili and commandite society Andronikashvili, Saxen-Altenburgh, Baramidze and Partners vs Georgian Parliament, Decision №1/1/43 of the First Board of the Constitutional Court, Tbilisi, 1 March 2007.

do not intend to appeal to courts in the near future ... They lodged the constitutional claim as lawyers". Based on these circumstances and taking into account the abovementioned criteria developed by the Constitutional Court, the Constitutional Court did not regard the claimants as "potential victims" and did not admit their claim for the hearing of the merits[15].

It should be noted that the institute of a "potential victim" of the violation of rights appeared in the Georgian Law on the Georgian Constitutional Court, owing to the amendment to the law approved on 12 February 2002[16]. This was definitely a step forward for further improving the protection of human rights by means of courts. This, as well as other legislative innovations, have brought the Georgian legislation closer to European law and ensured the broad application of the European Court of Human Rights' case law in national constitutional justice[17].

We have already noted above that the Constitutional Court's adjudicative power can also be exercised on the basis of a complaint from the Public Defender. The Public Defender is a high official envisaged by the Constitution, who monitors the situation of human rights and freedoms. He or she is authorised to reveal facts of violations of human rights and freedoms and to inform the relevant bodies or persons about them (paragraphs 1 and 2, Article 43 of the Constitution). Given this status of the Public Defender, and also bearing in mind Paragraph 1, Article 89 of the Constitution, it is absolutely understandable that the Georgian Organic Law on the Constitutional Court (Subparagraph B, Paragraph 1, Article 39) and the Georgian Organic Law on the Public Defender (Paragraph I, Article 21) grant the Public Defender the right to appeal to the Constitutional Court with a constitutional complaint if he or she believes that a normative act (or any part thereof) violated the human rights and freedoms recognised under Chapter II of the Constitution.

Given the essence of the abovementioned legislative provision, several circumstances need to be taken into account. In particular, the Public Defender may challenge only those normative acts in the Constitutional Court that regulate the human rights and freedoms recognised under Chapter II of the Constitution. Moreover, the Public Defender is obliged to explain how a disputable normative act conflicts with the human rights and freedoms recognised under Chapter II of the Constitution, although he or she is not required to present concrete facts of human rights violations by a disputable normative act to prove the above said. The Public Defender may appeal to the Constitutional Court with a request to examine the constitutionality of a normative act (or part of it) even when he or she thinks that in abstracto it violates the human rights guaranteed by the Constitution. For example,

[15] See also, Georgian Citizens Vakhtang Menabde and Irakli Butbaia vs Georgian Parliament. Decision №1/5/424 of the First Board of the Georgian Constitutional Court, Batumi, 9 October 2007.

[16] Georgian legislative bulletin, 2002, №4, Article 14.

[17] In this regard see Lasha Chelidze. Court practice of using case law of the European Convention on Human Rights and Strasbourg Court by Georgian constitutional and common courts. European and national systems for the protection of human rights. Collection of articles (Editor. K. Korkelia), Tbilisi, 2007, pp. 140-223.

the Public Defender lodged a constitutional complaint with the Constitutional Court on 20 June 2002 demanding that Part 7, Article 162 and Part 4, Article 406 of the Code of Criminal Procedure be declared unconstitutional against the provisions of Paragraph 6, Article 18 of the Constitution, which stipulate that the term of a detainee's preliminary detention shall not exceed nine months. In contrast to the Constitution, the disputable norms allowed for preliminary detention longer than nine months since, according to these norms, the time spent by a lawyer and a detainee on familiarisation with the case materials was not taken into account in the calculation of the length of preliminary detention. The Constitutional Court, by its decision, satisfied the Public Defender's constitutional claim and declared the Criminal Code's disputable norms as unconstitutional[18]. In this case, the Public Defender limited himself to abstract reasoning for the claim's substantiation and did not quote any concrete facts of violation of a person's constitutional rights.

[18] Georgian Public Defender vs Georgian Parliament, №1/5/193, 16 December 2003. Decisions of the Georgian Constitutional Court. 2003, Tbilisi, pp. 166-170.